

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 25, 2010 Session

**JACQUELINE MORAN v. CUMBERLAND COUNTY MEDICAL
CENTER, ET AL.**

**Appeal from the Circuit Court for Cumberland County
No. CV004298 Amy Hollars, Judge**

No. E2010-00858-WC-R3-WC - Filed March 8, 2011

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee injured her back while discharging her duties in the housekeeping department of her employer in October 2003. After treatment in the emergency room, she received conservative treatment from her physicians. She was released by her physician and returned to work. In February 2005, she was terminated by her employer. She continued to receive medical treatment for her back. In 2006, her physician recommended surgery, which was performed in December 2007. The trial court found that the employee was permanently and totally disabled as a result of her injury. The employer has appealed, contending that the employee had a meaningful return to work and that the award should be limited to two and one-half times her medical impairment ruling pursuant to Tennessee Code Annotated section 50-6-241(a)(1). The employer also contends that the evidence preponderates against the trial court's finding that the employee was permanently and totally disabled. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit
Court Affirmed**

JON KERRY BLACKWOOD, SR.J., delivered the opinion of the Court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR.J., joined.

C. Douglas Dooley and Barret S. Albritton, Chattanooga, Tennessee, for the appellants, Cumberland County Medical Center and Liberty Mutual Insurance Company.

Craig P. Fickling, Cookeville, Tennessee, for the appellee, Jacqueline Moran.

MEMORANDUM OPINION

Factual and Procedural Background

Jacqueline Moran (“Employee”) was a housekeeper for Cumberland County Medical Center (“Employer”). She injured her lower back on October 9, 2003, while cleaning a discharge room. She testified that she was attempting to move a chair and felt as if her “back just broke.” Employee notified her supervisor, and Dr. Susan Pick, an orthopaedic surgeon, was authorized to treat Employee. Dr. Pick testified by deposition that she initially saw Employee on October 21, 2003. Her original diagnosis was lumbar pain and lumbar strain. Dr. Pick testified that she treated Employee conservatively but observed symptoms of symptom magnification by Employee during several of her visits. Dr. Pick ordered an MRI and referred Employee to Dr. Cruz, a neurosurgeon. Dr. Cruz did not feel that surgical intervention was necessary. Relying on Dr. Cruz’s findings, Dr. Pick opined that Employee reached maximum medical improvement on March 30, 2004. Employee was released at that time with no permanent restrictions on her work activity. Dr. Pick assigned a 6% permanent anatomical impairment to the body as a whole. Employee returned to work with Employer, but continued to experience pain and discomfort. Her last visit to Dr. Pick was in June 2004. Employee continued to work until she was terminated in February 2004. Employee testified that she was terminated because she could not perform her work duties due to her back condition. Employer contends that her termination was for unexcused absences.

After her termination, Employee continued to experience problems with her back. The record reflects that several motions were filed to compel medical benefits. No order was entered in response to these motions. However, Dr. Robert Davis, a neurosurgeon, became her authorized treating physician in 2005.

Employee testified that in August 2004, she accepted a position with the Hilltoppers Agency as a full time caregiver for a wheelchair-bound patient. Her duties required her to push her patient up a ramp, provide medication, load and unload the wheelchair, and bathe the patient. Her responsibilities required her to bend, crouch and push. Employee testified that she believed she was physically capable of performing her duties. However, she further testified that those activities hurt her back and increased her pain. She related that her symptoms worsened, causing her to experience numbness and tingling in her legs. Employee left her job with Hilltoppers in July 2007 because of a viral infection.

Dr. Davis testified by deposition that he first saw Employee in April 2005. After ordering an MRI, Dr. Davis’ initial diagnosis was mechanical back pain and lower extremity radicular pain. Dr. Davis felt that surgery was not necessary, and he released Employee. In June 2005, Employee was treated in the Cumberland County Medical Center Emergency

Room as a result of pain she experienced while lifting a grandchild. Employee returned to Dr. Davis in December 2005 complaining of increased pain. She did not mention to Dr. Davis that she had visited the Cumberland County Medical Center Emergency Room as a result of the pain she experienced while lifting her grandchild. As a result of her December 2005 visit, Dr. Davis ordered a second MRI, which indicated degenerative changes. The MRI also revealed a progression of the disc protrusion that was shown on the April 2005 MRI. Consequently, Dr. Davis ordered a discogram, which showed degenerative changes at L5-S1. He recommended a surgical fusion at that level, which was performed on December 12, 2007. Dr. Davis opined that Employee's October 2003 injury caused her pre-existing degenerative disc disease to become symptomatic, "leading ultimately to surgery and treatment." Dr. Davis assigned a 21.5% permanent impairment and recommended that she be limited to sedentary work.

Dr. Davis admitted on cross-examination that he had not seen any of the records of medical treatment that Employee received from Dr. Pick or any other medical provider before she visited him. Dr. Davis was also cross-examined about the lifting of the grandchild. Dr. Davis stated that Employee did not inform him of that incident and denied in December 2006 that she had suffered any new injury. Dr. Davis testified that he was unaware of that event until December 5, 2006, when Employer's insurance carrier wrote him concerning this incident. Dr. Davis testified that he requested Employee to come to his office to discuss that issue. After discussing that lifting incident with Employee, Dr. Davis testified that "[s]he described what sounded like an aggravation of a baseline condition and pretty much returned to baseline, so it didn't materially change the situation."

Julian Nadolsky, a vocational evaluator, examined Employee at the request of her attorney. He testified that, according to his testing, Employee was able to read at a fifth-grade level and perform arithmetic at a seventh-grade level. He opined that she was 100% vocationally disabled. Mark Boatner, a vocational evaluator, evaluated Employee at the request of counsel for Employer. He relied upon the results of Mr. Nadolsky's testing. He opined that she had 0% vocational disability at the time she was released by Dr. Pick. He agreed that she had 100% vocational disability as a result of the December 2007 surgery.

Employee was fifty years old when the trial occurred. She had attended school through the eighth grade and had no additional education. Prior to being hired by Employer, she had worked as a cashier, meat packer, and janitor. After being terminated by Employer, she worked as a home health aide with the Hilltoppers Agency. She testified that the viral infection that she suffered at Hilltoppers caused her to have memory lapses. As a result, her trial testimony was supplemented by her two discovery depositions. She has not worked since recovering from that infection. She testified that she still has chronic low back pain and cannot sit or stand for periods longer than thirty minutes. These conditions make it

difficult for her to do housework.

The trial court held that Employee was permanently and totally disabled as a result of her October 2003 injury. Employer has appealed, asserting that the trial court erred by awarding more than 2.5 times the anatomical impairment. In the alternative, it contends that the trial court erred by finding that Employee was permanently and totally disabled due to her work injury.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Meaningful Return to Work

Employer first contends that any award of benefits should have been limited to 2.5 times the anatomical impairment pursuant to Tenn. Code Ann. § 50-6-241(a)(1) (2008). The premise of this contention is that Employee had a meaningful return to work for Employer but was subsequently terminated for cause in February 2005. In its brief, Employer asserts that the basis of the termination was "unexcused absences without medical documentation." That assertion is based upon a statement to that effect, attributed to Employee, in the written report of Mr. Boatner. However, Employee testified at trial that she was terminated because she was unable to perform her job duties. It should be noted that Employer did not raise this issue at trial. Secondly, Employer did not introduce any further proof on this issue other than the report containing the alleged statement made by Employee. Employer did not introduce evidence such as testimony of a supervisor or human resources manager to explain the circumstances of Employee's termination. Based upon the record, we are unable to conclude

that the evidence preponderates against the ruling of the trial court.

2. Permanent Total Disability

Employer also contends that the evidence preponderates against the trial court's finding that Employee is permanently and totally disabled. The linchpin of this argument is that the deterioration of her condition after she was released by Dr. Pick was the result of factors other than her work injury. Employer argues that her return to full-duty work for Employer until February 2005 illustrates that the effects of the October 2003 injury were minimal. It points to her subsequent period of employment as a caregiver for disabled persons, described as strenuous, as further support for its position. Finally, it contends that Dr. Davis's testimony concerning the changes between the May 2005 and December 2005 MRI scans, viewed in light of Employee's June 2005 emergency room visit for back pain after lifting her grandchild, demonstrates that (1) her condition changed (2) as a result of the June 2005 event or some other factor.

As the trial court noted, Dr. Pick's testimony is limited to the period of time that Employee was her patient. Dr. Davis was the only medical expert that addressed the lifting incident. Dr. Davis was made aware of this incident and testified that it did not materially change Employee's initial condition. The record does not contain any medical records from the emergency room visit of June 2005 or any medical testimony to indicate that the lifting incident caused a new injury. Therefore, we conclude that the evidence does not preponderate against the trial court's finding that Employee is totally and permanently disabled.

Conclusion

The judgment of the trial court is affirmed with costs assessed against the Employer and its surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

The judgment of the trial court is affirmed with costs assessed against the Employer and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM